WAKO MERCHANT BANK (SINGAPORE) LTD

v.

LIM LEAN HENG & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD JCA
[ORIGINATING SUMMONS NO: D2-24-355-1998]
14 JANUARY 2003

CIVIL PROCEDURE: *Affidavits - Cross-examination - Application for - Rules of the High Court 1980, O. 38 r. 2 - Matter involving conflict of affidavit evidence - Whether application to be granted*

The plaintiff had obtained a judgment against the first defendant in Singapore. Fearing that the first defendant would dissipate his assets to avoid satisfying the judgment, the plaintiff subsequently filed an *inter partes* application for Mareva injunction to restrain him from disposing of his assets. The plaintiff had also filed for garnishee proceedings and charging order proceedings. The 2nd to the 16th defendants claimed that some of the assets involved belonged to them and intervened to oppose the said applications. The 1st, 2nd, 7th, 15th and 16th defendants filed separate affidavits for that purpose. The plaintiff applied to this court under O. 38 r. 2 of the Rules of the High Court 1980 for an order to cross examine those five defendants on their affidavits, and of three other persons who had made declarations of trust regarding certain assets. It was agreed by the parties that the cross-examination would be confined to the plaintiff's application for the Mareva injunction and not for the garnishee and charging order proceedings.

Held:

[1] Where it is necessary to come to a determination of the matter that is subject of a conflict of affidavit evidence and it is not possible to reject the evidence of one side for any of the stated reasons, the court is not equipped to deal with the conflict without resort to cross examination. (p 729 g)

[2] The main action to the present case had been disposed of in Singapore with judgment against the first defendant. The claims of the defendants to the disputed assets had, however, to be determined in the disposing of the Mareva injunction. Issues relevant to the claims had to be tried for a proper determination of the claims. One form the trial could take would be the cross examination of the deponents of the affidavits concerned and of the three other persons. (p 732 f)

[Plaintiff's application for cross-examination allowed.]

Case(s) referred to:
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
SCF Finance Co v. Masri [1985] 1 WLR 876 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 38 r. 2, O. 49, O. 50

For the plaintiff - Ong Chee Kuan; M/s Lee Ong & Kandiah
For the 1st defendant - Gopal Sreenevasan (Charmaine Chow & Shahnaaz Omar); M/s Sivananthan
For the 2nd-14th defendants - S Suhendran (LK Mak); M/s Kadir, Andri Aidham & Partner
For the 15th & 16th defendants - Ranjit Singh (KH Yeoh); M/s Ranjit Ooi & Robert Low

[The 1st defendant has filed an appeal to the Court of Appeal vide Appeal No: W-02-848-02]

[The 2nd-14th defendants has filed an appeal to the Court of Appeal vide Appeal No: W-02-863-02]

[The 15th & 16th defendants has filed an appeal to the Court of Appeal vide Appeal No: W-02-849-02]

Reported by M Maheswaran

JUDGMENT

Abdul Aziz Mohamad JCA:
The first defendant is indebted to the plaintiffs under a judgment obtained in the Republic of Singapore which has been registered as a judgment of the High Court in Malaya under the Reciprocal Enforcement of Judgments Act 1958. Believing that the first defendant would dissipate his assets in Malaysia in order to avoid execution to satisfy the judgment, the plaintiffs applied for *ex parte*, and obtained from me on 17 June 1999, a Mareva injunction to restrain the first defendant from disposing of his assets. Having obtained the *ex parte* Mareva injunction, on 25 June 1999 the plaintiffs by summonses in chambers filed two forms of execution proceedings, namely, garnishee proceedings under O. 49 and charging order proceedings under O. 50. In those two proceedings, which were and still are before the senior assistant registrar, orders *nisi* were obtained on 30 June 1999. Since under our Rules of the High Court 1980 an application obtained *ex parte* would be of a limited duration only, the plaintiffs on 5 July 1999 also filed an *inter partes* application by summons in chambers for a Mareva injunction, which application is yet to be heard.

Claiming that some of the assets affected by the Mareva injunction that the plaintiffs sought and by the garnishee and charging orders *nisi* belonged to them, the second to the sixteenth defendants intervened to oppose the plaintiffs' *inter*

partes Mareva application and applications for the garnishee and charging orders. Affidavits were filed separately by the first, second, seventh, fifteenth and sixteenth defendants, each to oppose the plaintiffs' three applications together. One or two of those five defendants affirmed their affidavits on behalf of the other ten of the fifteen intervening defendants or some of them.

Garnishee orders absolute and charging orders absolute have been made in respect of assets that were not claimed by the second to the sixteenth defendants or ownership of which was admitted by the first defendant. In respect of assets that were claimed by fifteen defendants, the garnishee proceedings and charging order proceedings before the senior assistant registrar have been stood over pending the disposal of an application made by the plaintiffs under O. 38 r. 2 for an order for cross-examination of those five defendants on their affidavits, and of three other persons who have made declarations of trust in respect of certain assets, which declarations were exhibited to the affidavit of the second defendant.

The application for cross-examination came to be heard before me. After much argument, it was agreed all round that the application be proceeded with on the basis that the cross-examination that was sought should only be for the purposes of the plaintiffs' *inter partes* Mareva application and not also for the garnishee and charging order proceedings.

After hearing submissions on the application for cross-examination, I allowed the application. These grounds of decision are the grounds of my decision allowing that application.

Before I proceed further, because the point was mentioned in submission, I ought to state that another Singapore judgment against the first defendant has also been registered under the 1958 Act. To enforce that judgment, the plaintiffs have proceeded by way of a judgment debtor summons. That, however, is a separate case and has nothing to do with the judgment arising from which the application for cross-examination that I decided was made.

The plaintiffs' counsel went to great lengths and in great detail to examine each of the affidavits in order to show the various averments and matters in it that were capable of raising the question whether the claims made in it were true. The details are rather complicated, but I am saved the task of setting them out because the defendants' counsel, in their submissions in reply, did not deal with the facts in order to demonstrate, for example, that there was nothing of merit in the points picked out by the plaintiffs' counsel or that a point that appeared to raise doubts on the claim to ownership of an asset was capable of being resolved on the affidavits themselves without any need for cross-examination. The first defendant's counsel, who made the major

submission in reply, to which the other defendants' counsel agreed, merely cited the following *dictum* of Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p. 217 E (right):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

It was cited to support the submission that the court is well-equipped to deal with conflicts of affidavit evidence in interlocutory proceedings without having to resort to cross-examination.

From the passage, two lessons may be learned. One is that if there is a conflict of evidence on affidavit, a judge ought not to attempt to resolve it, which I understand to mean resolve as the evidence stands on affidavit. That means that the judge either does not take into consideration the matter or aspect that is the subject of the conflict or, where it is necessary for the case before him to make a definite finding on the matter or aspect, the conflict has to be resolved by the examination of the makers of the affidavits concerned. The other lesson to be learned is that where there is conflict of evidence on affidavit, the evidence of one side may be rejected, and the evidence of the other side accepted, if the evidence of the former is for any of the reasons stated in the passage not worthy of acceptance. It was, however, not suggested, and therefore not demonstrated, that in any area of conflict of evidence in this case the plaintiffs' evidence deserved to be rejected on any of those grounds. I mention the plaintiffs' evidence only because the defendants would of course not have wanted to suggest that any aspect of their evidence suffered from such a disqualifying weakness or deficiency.

It is, therefore, not true in every case that the court is equipped to deal with conflicts in affidavit evidence without resort to cross-examination. Where it is necessary to come to a determination of the matter that is the subject of a conflict of affidavit evidence and it is not possible to reject the evidence of one side for any of the stated reasons, the court is not equipped to deal with the conflict without resort to cross-examination.

The defendants' stand in submission in response and opposition to the plaintiffs' application and submission was solely one of law or procedure, their main argument being that the purpose of the cross-examination that was sought would go to the determination of the question of ownership of assets, which question, as the defendants saw it, needed to be determined not so much for the Mareva application but for the ultimate relief that the plaintiffs sought, namely execution

or enforcement through the garnishee proceedings and the charging order proceedings, and therefore the proper forum for the issue of ownership of assets was those proceedings, which were and still are before the senior assistant registrar, and the need for cross-examination to determine the question of ownership did not arise for the Mareva application.

The state of things was that there was the *inter partes* Mareva application to be heard and decided, for the disposal of which the plaintiffs saw that they needed to cross-examine the makers of the defendants' affidavits. The garnishee and charging order proceedings had been put on hold pending the disposal of the application for cross-examination. It was not unlikely that those proceedings would continue to be put on hold pending the disposal of the Mareva application. It seemed to me that the question to be answered was whether, in a Mareva application, if a person other than the defendant claims an asset that the plaintiff seeks to preserve by the injunction on the contention that it is the property of the defendant, the question of the true ownership has to be determined. If it has to be determined, then if there is conflict of affidavit evidence on any matter relevant to the question of ownership, and the conflict cannot be resolved by rejecting the evidence of one side for any of the reasons stated by Lord Diplock, then the matter of the conflict has to be determined by examining the makers of the affidavits so that the question of true ownership may be determined. If the question of true ownership has to be determined on a Mareva application, it does not matter in this case that it could also be determined in the garnishee and charging order proceedings. It may even help to expedite the disposal of those proceedings if the question of true ownership were decided on the Mareva application.

The answer to the question that I posed just now was, as it seemed to me, to be found in *S.C.F. Finance Co. v. Masri* [1985] 1 WLR 876, a case which the first defendant's counsel himself cited in response to my request for an authority on the question. It was a decision of the English Court of Appeal on an appeal from the refusal of an application by a third party, the wife of the defendant, to have a Mareva injunction affecting assets that included a sum of money in her bank accounts discharged. It was not an application for a Mareva injunction as it is in the case of the plaintiffs here, but the point of law that arose and the answer to it were framed as for the granting of a Mareva injunction.

The point of law underlay the following questions at p. 879 F-G:

> What happens when there is a dispute between the plaintiff and a third party as to the ownership of assets within the jurisdiction? What happens if the plaintiff says that the assets belong to the defendant, and the defendant says that they do not? Or if a third party claims they belong to him?

Counsel for the third party (Mr. Carr) asserted the following principle (p. 880 A-C) for the answer:

> When a plaintiff can show that he is in principle entitled to a grant of a Mareva injunction, but it then appears that there is an issue whether assets truly belong to the defendant, or whether a third party has a good claim to an interest in those assets, the defendant should not be injuncted from acknowledging and giving effect to the third party claim or interest, despite the fact that the validity of the third party claim remains untried; nor should the third party be required to justify his claim, by giving information as to the circumstances in which he came by those assets.

He submitted (p. 880 C-D) "that once a third party raises an issue as to the ownership of assets which are the subject of a Mareva injunction, by asserting a claim to those assets, then the court cannot investigate the correctness of the assertion. It must give effect to the assertion forthwith. There is no room for the trial of an issue between the plaintiff and a third party as to the ownership of the assets. The interests of the third party must in all cases prevail without question over the interests of the plaintiff".

The Court of Appeal rejected the principle asserted by counsel for the third party and they did so in the following words of Lloyd LJ at p. 881 B-C:

> So I see no difficulty in the court's resolving any dispute which may arise between a plaintiff and a third party as to the ownership of assets to which the Mareva injunction has been applied. If that is so, then I can see no reason whatever why the court should be obliged to discharge the injunction on the mere say so of the third party. If the court were so obliged, then the Mareva jurisdiction would be in danger of being nullified at the whim of the unscrupulous. If a court were not permitted to inquire into a third party's claim, but were bound to accept it at its face value, how could the court be satisfied that any transfer of assets to the third party had occurred before rather than after the injunction? Every consideration of policy and convenience points, in my view, against the principle which Mr. Carr asserts.

The Court of Appeal gave at p. 884 the following summary of the position:

> (i) Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, eg, a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene. (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is

a just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient. (v) On the facts of the present case the judge was in my view plainly right to hold that he could not decide the matter without further inquiry; for the reasons I have already mentioned he was not obliged to decide in favour of the second defendant, without further inquiry, by any rule or principle such as that suggested by Mr. Carr.

c I was inclined to omit consideration of points (i) to (iii) in the summary because in view of the points that had been raised by the plaintiffs to question the defendants' claims to the various assets I did not think it likely that on the hearing of the Mareva application the judge hearing it would be asked, or would be disposed, to accept the defendants' claims merely on their say so or merely d on the strength of the fact that any of the assets might be in the name of any of the defendants or anyone else. The judge would have to examine the defendants' claims against the plaintiffs' averments and arguments, that is to say, the judge would not be likely to accept the defendants' claims without further enquiry. It was therefore point (iv) that needed to be looked at. It gives e two alternatives. Either order an issue to be tried between the plaintiff and the third party in advance of the main action or order that the issue await the outcome of the main action, but in any case the issue has to be determined by trial. In the case before me there was no main action to be tried. The main action had been disposed of in Singapore with judgment against the first f defendant. The claims of the defendants to the disputed assets had, however, to be determined in the disposing of the Mareva application. Issues relevant to the claims had to be tried for a proper determination of the claims. One form that the trial could take would be the cross-examination of the deponents of the affidavits concerned and of the three other persons.

g For those reasons, and guided by those considerations, I allowed the plaintiffs' application for cross-examination.

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